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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

JAMES CITY COUNTY, VIRGINIA,

Petitioner,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY and
U.S. ARMY CORPS OF ENGINEERS,

Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Environmental Protection Agency, having long interpreted section 404(c) of the Clean Water Act to require consideration of whether a "practicable" alternative to a project is or is not available, may ban construction of a public water supply project as to which there is no such alternative without ever considering the urgent public needs to be served by the project.[1]

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[1] We have taken the liberty of slightly revising the first Question Presented to correspond to the focus of the argument that follows. We do not address the second question.

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BRIEF AMICUS CURIAE ON BEHALF OF NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") represents over 170,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB is, therefore, concerned with any judicial decision that presents an important issue of federal law with significant practical consequences for land use. Here, the Court of Appeals for the Fourth Circuit has fashioned a new

interpretation of the Clean Water Act that gives the Environmental Protection Agency largely unconstrained veto power of section 404 permits authorizing the placement of fill in waters of the United States. Many members of the NAHB carry out activities that require section 404 permits and will now be subject to the new interpretation. These builders spent months and even years working with federal and state permitting authorities to develop acceptable projects. This decision, if it stands, would allow the EPA to step in at the last minute and veto the permit.

The NAHB has been before the Court either as an *amicus curiae* in support of or as counsel on behalf of the property owner in prior cases involving governments' land use decisions. *Dolan v. City of Tigard*, No. 93-518 (June 24, 1994); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);[2] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

Because of its broader perspective, the NAHB brings to this case a different focus. As will be evident from what follows, the present brief is not a mere re-iteration of the points made in the Petition. See Rule 37.1 of the Rules of this Court.

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[2] The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

ARGUMENT

A. INTRODUCTION AND SUMMARY

The practical impact of the decision below is difficult to exaggerate: If it stands, EPA will enjoy effectively unrestrained power to halt any development of land that encompasses any damp area, no matter how significant the public need for the project, no matter that no alternative site or design is available, no matter how generous a mitigation plan is offered. This is, of course, the focus of concern for the National Association of Home Builders, and this brief, accordingly, will primarily stress the significant consequences of this new arrogation of power by EPA, and why (contrary to the decision below) it oversteps the agency's mandate under the Clean Water Act.

But we also flag broader concerns of administrative law that may equally weigh in this Court's decision whether to grant certiorari: the green light given to an agency to interpret the controlling law of Congress *without any meaningful constraint*, and *radically to change* that interpretation, even in the same case, *without reexamination or explanation*, but simply as a matter of convenience to reach a particular result in a given instance.

B. THE PRACTICALLY SIGNIFICANT AND LEGALLY ERRONEOUS CONSTRUCTION OF THE CLEAN WATER ACT

1. Let it be clear what the decision below has condoned. On remand, EPA *might* have said: It being settled that there is no practical alternative way of providing necessary water to the County, we take into account the seriousness of that water need and consider whether the unavoidable environmental consequences of the reservoir project are nevertheless "unacceptable" because they are *so significant* as to outweigh the countervailing public interest. But that is *not*

the stance ultimately adopted by EPA. Notwithstanding its previous statements, the agency now said: We need not, and in this instance do not, take notice of the County's water requirement or the practical impossibility of satisfying it by any other means; we focus solely on the environmental harm resulting from the project and, without any weighing against needs or benefits, we find that harm "unacceptable." This approach was unambiguously announced by EPA in its Final Determination after the remand,[3] was repeated by EPA's counsel in both courts below,[4] and was understood and endorsed by the Court of Appeals.[5]

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[3] "This determination concludes that considerations of environmental effects alone justify a Section 404(c) action to 'veto' the proposed James City County water supply dam and reservoir." Pet.App. G-4. "As outlined previously in this document, for the purposes of this decision, EPA's review of the Ware Creek dam and reservoir proposal was limited to a determination of whether the environmental effects of the proposed project would have unacceptable adverse effects under statutory criteria at Section 404(c). The findings and conclusions in this document are based solely on consideration of the environmental effects of the Ware Creek proposal." *Id.* at G-72.

[4] *See* Pet. 15, 16. Unlike Petitioner (*see* Pet. 23-25), we do not read counsel's statements as supplying a post-hoc rationalization of the agency's action. In our view, the court below was right to treat all the expressions of EPA's new approach to "unacceptability" as congruent.

[5] "On remand, the EPA considered its administrative record and again vetoed the § 404(b) permit—basing its veto solely on environmental considerations." Pet.App. I-3. "In its Final Determination After Remand, the EPA, of the view that our remand required it, deleted the discussion of a putative regional water supply and concluded that its veto was justified solely on the basis of unacceptable adverse effects on the environment." *Id.* at I-9. "The EPA, in reply, asserts that while it may in its sole discretion consider the need for water, the only requirement placed on it by Congress is to consider the project's potential adverse impacts on the environment." *Id.* at I-10. "In our view, the EPA's only function relating to the quantities of available water is limited to assuring purity in whatever quantities the state and local agencies

We immediately notice a contradiction in this new EPA stance: If countervailing public benefits and the unavailability of alternative means of achieving them are *legally irrelevant* to EPA's section 404(c) task, how can it be proper for the agency to consider them "in its discretion?" This is but one indication of how uncabined EPA's raw power becomes under the ruling below. *See* point C.1., *infra*. For the moment, however, we focus on the consequences of the holding that EPA is free wholly to ignore needs and benefits in determining whether the environmental harm from a proposal is "unacceptable."

2. If "unacceptable" relates only to environmental harm, without any regard to whether it is avoidable and without any concern for other consequences (as the Court of Appeals held), then it is arguable that any measurable potential prejudice to wildlife justifies an EPA veto. Indeed, if every case is to be judged as if the project served no public need and easily could be restructured to avoid environmental impact, it might be entirely reasonable to proscribe all projects that impinge on the animal kingdom, however slightly.

This might be tolerable if the sway of the Clean Water Act were less. But the empire carved out by the implementing agencies is huge. Although one may doubt the propriety, the Corps of Engineers and EPA today assert Clean Water Act jurisdiction over nearly every intrastate "wetland," very expansively defined, and every trickle of water, even temporary accumulations of rainwater, no matter how isolated from any navigable waterway, provided only the area is potentially useable by migratory birds. *See, e.g., Leslie Salt v. United States*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991). What is more, under the prevailing interpretation of the Clean Water Act as precluding pre-

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provide. For these reasons, we think its veto based solely on environmental harms was proper." *Id.* at I-13.

enforcement judicial review, except only for permitting decisions (*see, e.g., Rueth v. U.S. EPA*, 13 F.3d 227 (7th Cir. 1993)), the agencies are able to subject to the permit process projects that are, strictly speaking, beyond the purview of section 404. Thus, the practical consequence of the ruling below is that, at least in many parts of the country, EPA will enjoy an unfettered power to halt almost all projects of any size involving the movement of soil and all those arguably requiring a Corps of Engineers permit under section 404 of the Clean Water Act.

3. It may be answered that EPA will not so abuse its power and that, if it should, the courts will afford relief. No one confidently can predict how EPA will use its newly declared prerogative. But there are good grounds for apprehension. The pressure on the agency, internal and external, to wield its power to the full in defense of fish and wildlife will be difficult to overcome. Moreover, as we have said, if all other factors are irrelevant (as under the Endangered Species Act),[6] it is perhaps reasonable for EPA to act as a strict guardian, vetoing every permit that potentially harms any animal, in any degree.

Nor is judicial review an effective brake. To be sure, the District Court in the present case struck down EPA's finding of significant harm to the environment. But it was pointedly reversed for "failing to recognize the deference due the EPA's determination," which, said the Court of Appeals, was subject only to scrutiny under the very lax "arbitrary and capricious" standard. Pet.App. I-16 to I-18 and n.4.

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[6] 16 U.S.C. § 1531 *et seq. See TVA v. Hill*, 437 U.S. 153, 172-193 (1978). This Court there held that neither "the anticipated benefits" of the Tellico Dam nor the investment of "many millions of dollars in public funds" could be weighed against the harm to the endangered snail darter. *Id.* at 174. But that conclusion was reached on the basis of an unambiguous Congressional command. There is nothing comparable here.

That is likely to be the usual outcome, the courts being understandably reluctant to second-guess factual findings entered in the exercise of its "experienced expertise" by the agency charged by Congress to protect the environment. Besides, once EPA's unrestrained veto power becomes the settled law, it will be less necessary for the agency actually to make final veto decisions, subject in theory to judicial review. In practice, the knowledge that EPA may, if it chooses, halt any project requiring a permit will inhibit applicants, the Corps of Engineers, and State agencies. At worst, this "chill factor" will kill projects that EPA, in fact, would not oppose; at best, it will confer upon the agency a truly lawless power to pick and choose among projects—perhaps haphazardly, perhaps to effectuate a "grand design" well beyond EPA's Congressionally given mandate.

4. We deem it clear that Congress intended to grant no such blank check. After all, section 404 of the Clean Water Act is a *permitting* provision, intended to allow the discharge of "dredged or fill material" into covered waters, albeit subject to safeguards. Given the prevalence of some form of wildlife in almost all such waters, it was obviously considered that some adverse effect on the habitat of fish or birds or other animals was tolerable, presumably where that harm was *unavoidable* and *relatively* minor when weighed against the benefits of the project. EPA's veto power cannot be allowed to convert the provision into a potentially blanket prohibition of every proposal that has adverse environmental consequences. That would effectively turn section 404(c) into the kind of categorical ban on harming *non-endangered* species that Congress later enacted — but only for imperiled wildlife—in the Endangered Species Act.[7]

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[7] On EPA's present reading of section 404(c) of the Clean Water Act, enacted in 1972, the 1973 Endangered Species Act was in some measure superfluous. In truth, the Endangered Species Act was a more

To be sure, the prerogative given to EPA by section 404(c) was intended to assure that environmental concerns would not be too easily overridden. But the agency is only authorized to veto a permit when the harm to fish or wildlife is "unacceptable." And, as EPA itself has consistently asserted in the past, even through the first stages of this very case, that term naturally imports a degree of *relativity*. There may be *some* extreme harms that are deemed "unacceptable" no matter how valuable the project. For the most part, however, what is "unacceptable" must depend on the context, and especially, one supposes, on whether the harm is *avoidable* by resort to an alternative plan. To quote the EPA of an earlier day, this is but "common sense." See Pet. 27, quoting the 1986 EPA Final Determination in the *Bersani* litigation.

Indeed, even now (if we understand its stance correctly), EPA asserts that it "may," in its discretion, take into account competing factors and the availability of less harmful alternatives. That must mean that the statutory term *is relative*, else it would be impermissible to look beyond the strictly environmental consequences of a project. Yet, EPA today insists it need not notice other factors. Is it conceivable that Congress meant to write a chameleon provision that means one thing one day, and the opposite the next, depending on the whim of the agency? We think not.

5. It may be, of course, that EPA effectively can have its way even if required to pay lip service to consideration of competing values and the unavailability of alternatives, since the courts are ill-equipped to determine whether the agency has appropriately weighed the several factors. But that is no reason to excuse a narrowly blinkered focus. If it can do little else, the judiciary *can* insist upon procedural regularity. In this Court, it is hardly necessary to stress that procedure

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draconian, but carefully limited, statute. Its terms illustrate that Congress knows how to write a purely environmental law when it wishes.

matters. Most of our Bill of Rights is premised on that understanding, as is the Administrative Procedures Act. And, indeed, so is much environmental law, notably the National Environmental Policy Act. *See, e.g., Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-228 (1980). One must at least hope that EPA will sometimes stay its hand if it is required to take a "hard look" at the consequences of its veto. *Cf. Kleppe v. Sierra Club*, 427 U.S. 390, 410 & n.10 (1976).

C. THE DANGEROUS AND ERRONEOUS ADMINISTRATIVE LAW PRECEDENT ANNOUNCED BY THE DECISION BELOW

1. It is of course well settled that courts should normally defer to the implementing agency's construction of the statute it administers. *Chevron USA v. NRDC*, 467 U.S. 837 (1984). But that principle governs only when the administrative construction is a "reasonable" reading of an ambiguous statutory provision. *Id.* at 842-844. *See also MCI Tel. Corp. v. American Tel. & Tel. Co.*, No. 93-356, slip op. 11 (June 17, 1994). Here, even conceding that section 404(c) is not entirely clear, we submit that EPA's current construction does not satisfy any standard of "reasonableness."

It is enough to invoke again the point already made: that EPA claims the right to read "unacceptable" as an absolute or relative term according as the agency chooses in any given case. While it might be "reasonable" to suppose Congress intended one thing or the other, it is patently unreasonable to suppose it meant a single word to have two contradictory meanings, each to be invoked by the implementing agency as is most convenient to achieve a result. The administrative law rule of deference does not carry to such absurd lengths.

2. There is, moreover, an independent ground for rejecting EPA's current reading of section 404(c). It is the

sudden, very belated, unexplained "discovery" of a new meaning, more than twenty years after the enactment of the statute, in very suspect circumstances.

One might have to grin and bear it if EPA's unconfined power to veto a permit on the basis of potential harm to wildlife alone had been the settled law since the enactment of the Clean Water Act in 1972, or at least for many years before the decision below. But that is emphatically not the case. The Court of Appeals itself makes the point, noting the very different stance EPA had taken in an earlier phase of this very litigation:

> [I]n *JCC-I*, relying on the legislative history of the Clean Water Act and the preamble to tis [sic] own regulations implementing that act, the EPA took the position in the district court that "the 'acceptability' of adverse [environmental] effects can best be evaluated in light of all relevant factors, including such concerns as the availability of alternatives." The EPA asserted that this had been a long-standing agency policy.[8]

Pet.App. I-11. And the Court added that it found "no precedent" for EPA's new stance, reciting as correct the charge that "EPA's position in other litigation ha[d] been grounded on [the] argument" that the agency was "required to consider a wide range of factors in determining what is 'acceptable.' " Pet.App. I-10.

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[8] *See also* Pet. 11. In the Court of Appeals, on the first appeal in this case, EPA adhered to this view:

> The statutory term "unacceptable" must certainly authorize the Agency to consider and balance a wide variety of pertinent factors, including the scope and severity of a project's environmental effects in light of the benefits to be obtained from it.

Pet. 13, quoting an EPA brief in the Court of Appeals.

We recognize that an administrative agency is entitled to change its view of the governing statute, even when one construction has persisted a long time. And deference is due to the new interpretation if it results from the "well-considered" judgment of an expert body, carefully rethinking the import of the statute during a "detailed and comprehensive process," and altering its reading "based on its 'expertise' and in light of [its] experience in administering the contested provision." *Robertson v. Methow Citizens Council*, 490 U.S. 332, 355-356 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). But an administrative change of course requires a "reasoned analysis." *Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 42, 57 (1983). There was nothing of the kind here.

On the contrary, the new approach was adopted by EPA without the slightest explanation or pretense of justification in past experience. Indeed, the agency acted so suddenly that it could not change its own regulations which, according to its earlier assertion, required it to consider factors other than environmental harm, including the availability of alternatives. The true impetus for the change is transparent: Told that it could not assert the availability of an alternative water supply, yet determined to adhere to its veto, EPA could not bring itself to dismiss the plight of the County as "outweighed" by wildlife concerns and accordingly invented the rule that it could simply blind itself to the consequences of its decision.

One might suppose that such a rule, born of awkward expediency rather than considered policy, would die with this case. But alas, the agency is no longer full master of what the Court of Appeals has blessed, and perhaps entrenched.[9] Whatever EPA's original intention, environmen-

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[9] Indeed, the opinion below may be read as *forbidding* EPA, henceforth, to go beyond its "only" "assigned function" of "assuring pure

tal groups and its own staff will insist that the agency exercise its new "unadorned" power. Only Congress or this Court can interdict the spread of the virus. Since the problem, in this instance, is judge-made, it seems appropriate to look to a higher court for the remedy. That task is in no sense premature, especially given that the decision below, vindicating the new approach, is in apparent conflict with a decision of the Second Circuit. *See* Pet. 26-28.

CONCLUSION

For the reasons stated here and in the Petition, certiorari should be granted to review the final decision of the Court of Appeals in this case.

August 23, 1994

Respectfully submitted,

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water" by taking into account whether the environmental harm is or is not avoidable, and, if not, the countervailing benefits of the project. *See* Pet.App. I-12, I-13.